IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No.....

EVANS D. GARDNER,

Petitioner,

vs.

CAPITAL TRANSIT COMPANY, a Corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion of the Court Below.

The opinion of the United States Court of Appeals for the District of Columbia appears on Pages 97, 98, 99 and 100 of the Record. The opinion was entered on December 17th, 1945, and has not been reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935, U. S. C. A. Title 28, Section 347 (a).

Statement of the Case.

The case has been stated under the heading "Statement of the Matter Involved" in the petition.

PART I.

It was error not to instruct the jury on the respective rights of way of a street car and an automobile as requested by the plaintiff.

Plaintiff's request for Instruction No. 1, which was refused, reads as follows:

> "You are instructed that the whole of Kenilworth Avenue, Northeast, from curb to curb is a public highway and that the permission given the Capital Transit Company to lay rails to operate street cars thereon does not take away from the portion of the street so used the character of a public highway, or give to the Capital Transit Company an exclusive right to the use of such portion of the street, but that the public using other vehicles may use the space beside the rails, and between the rails, and the rails themselves, and that when so used by other vehicles the street cars of such Company are required to give timely notice of their approach to vehicles in their way in order that such vehicles may get out of their way, and such street cars are subject to the same requirements as other vehicles and stand on a footing of equality with them in respect to using due care to avoid collision" (R. 84, 85).

The Trial Justice in instructing the Jury read to them Defendant's requested instruction Number 2, and added the following:

> "Now, while the street car has the right-of-way, a preferential right-of-way, it is not an exclusive right-of-way, and the street car company is not relieved of its duty to use reasonable care" (R. 91).

The instruction given omitted to inform the Jury:

1. That the whole of Kenilworth Avenue from curb to curb is *a public highway.*

2. That the permission given the Capital Transit Company to lay rails to operate street cars thereon does not take away from the portion of the street so used the character of a public highway.

3. That the public using other vehicles may use the space beside the rails, and between the rails, and the rails themselves.

4. And that when so used by other vehicles the street cars of such Company are required to give TIMELY NOTICE of their approach to vehicles in their way in order that such vehicles may get out of their way.

5. Such street cars are subject to the same requirements as other vehicles and stand on a footing of equality with them in respect of using due care to avoid collision.

In the case of Capital Traction Co. vs. Crump, 35 App. D. C. 169, 175, the Court of Appeals approved an instruction containing all of these elements. In Washington Ry. & Electric Co. vs. Buscher, 54 App. D. C. 353, 298 Fed. 675, the Trial Court granted an identical instruction. (Transcript of Record, Court of Appeals Case No. 4024, Page 30, Plaintiff's Prayer No. 1.)

The case of Jaquette vs. Capital Traction Co., 34 App. D. C. 41, on page 45, stated the street car company's right of way over its tracks as follows:

> " • • • Under such circumstances the franchise, or right of way of the company, is confined within the narrow limits strictly necessary for the operation of its cars, and even this is not an exclusive right of way, but

it remains a part of the street open to the public passing along and cross the street. In fact, it has no greater right to use the street than the public; and neither has a right to so use it as to make it dangerous to the other; nor can either impose an unreasonable burden upon the other as a result of this joint use. * * * "

* * * * *

Plaintiff's request for Instruction No. 1 further provided that "streetcars of such Company are required to give *timely notice* of their approach to vehicles in their way". This instruction was not given by the Trial Court.

The case of Kelly Furniture Co. vs. Washington Ry. & Electric Co., 64 App. D. C. 215, 217, 76 Fed. (2d) 985, states that the motorman must give reasonable notice of the approach of the car.

Denver City Tramway Co. vs. Cobb, 164 Fed. 41, says that the defendant must give a timely signal or warning of the approach of the car.

Capital Traction Co. vs. Crump, 35 App. D. C. 169, 177, says a timely warning must be given of the approach of the car.

PART II.

The Court of Appeals erred in holding that municipal ordinances may not be judicially noticed by courts of general jurisdiction.

Plaintiff's Requested Instruction No. 2, which was refused, was as follows:

"You are instructed as a matter of law that the plaintiff in driving his automobile at this place had the right to assume that the north bound streetcar would be pro-

ceeding at a lawful rate of speed. If the Jury finds from all the evidence that the streetcar at the time it was proceeding in a northerly direction on Kenilworth Avenue, N.E., when it struck the automobile of the plaintiff was being operated at a speed in excess of 25 miles per hour or at a speed that was greater than was reasonable under all the circumstances shown by the evidence then the defendant would be guilty of negligence and if such negligence was the proximate cause of the injuries sustained by the plaintiff then your verdict in this case must be in favor of the plaintiff." (R.85).

The Traffic and Motor Vehicle Regulations for the District of Columbia read as follows:

Article VI. OPERATION OF VEHICLES.

Section 22. Restrictions as to Speed.

(b) No person shall drive a vehicle upon a highway at a greater speed than is reasonable and prudent having due regard to the traffic, surface, and width of the highway, and the hazard at intersections, and any other conditions then existing.

(c) The speed of any vehicle on any street, highway or bridge in the District of Columbia shall not exceed 25 miles per hour, except as hereinafter specifically provided.

A. ALL COURTS TAKE JUDICIAL NOTICE OF THE PARTICULAR LAWS OF THE FORUM OR THE SUBJECTS PLACED UNDER ITS COGNIZANCE.

The Trial Court denied Plaintiff's Requested Instruction No. 2, because the District of Columbia Traffic Regulations pertaining to speed had not been offered in evidence (R. 86). The Court of Appeals sustained this decision saying "we have often said that municipal ordinances may not be judicially noticed by courts of general jurisdiction." (R.

99). Citing Tipp vs. District of Columbia, 69 App. D. C. 400, 102 F. 2d 264.

In the case of Tipp vs. District of Columbia, *supra,* the Court said:

> "The rule has been frequently stated that Municipal Ordinances, regulations and by-laws may not be judicially noticed by courts of general jurisdiction, but must be pleaded and proven as any other fact. * * * The rationale of the rule * * * is that such ordinances and regulations stand upon the same footing as private laws, * * * BUT THE REASON FOR THE RULE FAILS WHERE A MUNICIPAL COURT IS ASKED TO NOTICE AN ORDINANCE OF THE SAME MUNICIPALITY, BECAUSE SUCH ORDINANCES COME WITHIN THE PARTICULAR AND ORIGINAL JURISDICTION OF SUCH COURTS, and an exception to the general rule is recognized in most jurisdiction. Such courts stand in the same relationship to municipal laws as do courts of general jurisdiction to public laws and, CONSEQUENTLY AS TO THEM, THE LOCAL ORDINANCES ARE THE PECULIAR LAW OF THE FORUM."

Likewise, in the case at bar, the Traffic Laws of the District of Columbia, are the peculiar laws of the forum of the District Courts, which have exclusive jurisdiction of automobile damage suits where the amount involved is over the sum of Three Thousand ($3,000.00) Dollars.

The opinion in Tipp vs. District of Columbia, *supra,* clearly so provided, when it stated this rule on page 402, as follows:

> "The reason of the rule which requires a municipal court to take judicial notice of a regulation of the same municipality applies with equal force to a court invested with full original jurisdiction to enforce such regulations, even though it may have jurisdiction to enforce other laws as well."

The Law of the Forum rule is enunciated in 20 Am. Jur. 57, as follows:

> Section 32. LAW OF FORUM.
>
> "All courts must take judicial notice of the law prevailing within the forum, for that is the evident purpose of their existence, and it is immaterial whether the law in question is written or unwritten."

In the case of International Text-Book Co. vs. District of Columbia, 35 App. D. C. 307, the Supreme Court (now the District Court) of the District of Columbia, took Judicial Notice of a Police Regulation of the District of Columbia which "makes it unlawful to scatter paper, handbills, dodgers, cards, circulars or advertising matter of any kind in such manner as to litter the streets."

One of the reasons submitted in Tipp vs. District of Columbia, *supra,* as to why Courts will not Judicially Notice Municipal Ordinances is that such ordinances stand upon the same footing as private laws. However, this reason is untenable in the instant case.

In the case of Hoyt vs. Russell, 6 S. Ct. 881, 117 U. S. 401, the Supreme Court of the Territory of Montana, held that it would not take Judicial Notice of matters of mere private concern. The United States Supreme Court reversed this decision and said:

> "It is undoubtedly true that judicial notice is not taken of purely private concerns, when they are not connected with, or necessarily involved in, a matter of *public nature,* but it is otherwise when they are so connected or involved. * * * In the present case, the Court below was required to take notice of the extent of its jurisdiction, *not only of the subjects placed by law under its cognizance,* but of its extent territorially. It should have known judicially whether the laws of the territory, which it was appointed to expound, were in

operation with reference to a subject brought before it in the regular course of procedure. * * *"

B. ALL FEDERAL COURTS TAKE JUDICIAL NOTICE OF ACTS OF CONGRESS.

Congress in 1925 (the Act was amended in 1931) passed a general traffic law applicable to the District of Columbia. The Act covers the entire subject of traffic control in the District of Columbia. By the terms of the Act the Commissioners of the District of Columbia are authorized and empowered to make, modify, repeal, and enforce usual and reasonable traffic rules and regulations, etc. District of Columbia Code, Title 40—Page 1059. (1940 Code.)

The case of Persham vs. United States, 70 App. D. C. 116, 104 Fed. (2d) 249, speaking of the District of Columbia Traffic Act said:

"The Traffic Act, as amended to date may therefore, be said to delegate to the Commissioners of the District power and authority to make rules and regulations in relation to traffic on the Public thoroughfares, and to the Director of Parks authority to make rules and regulations in relation to traffic on the roads in the public parks within the District; * * *"

In LaForest vs. Board of Commissioners, 67 App. D. C. 396, 92 Fed. (2d) 547, it was contended that the delegation of power to the Commissioners of the District of Columbia in the Traffic Law Act was an unconstitutional delegation of power to the Commissioners. The Court of Appeals said that Congress may delegate a reasonable discretion to the Commissioners to carry out the legislative intent expressed in the Act. The Court said on page 398:

"While, therefore, mindful of the principle that the Legislature cannot delegate its power to make a law, it can, as was said by the Supreme Court in * * *, make

> a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make *its own action depend.* We think the present act is well within this latter principle."

In Lilly vs. Grand Trunk Western Ry. Co., 63 S. Ct. 347, 317 U. S. 481, it was argued that reliance could not be placed on a rule of the Interstate Commerce Commission because it was not called to the attention of the trial Court. The United States Supreme Court said:

> "Respondent insists that reliance cannot be placed on Rule 153 because it was not called to the attention of the trial court or the jury and its injection now would involve deciding the case on issues not submitted to the jury. We do not regard this point as well taken. No claim is advanced that the rule is invalid, and we see no reason for questioning it. *Adopted in the exercise of the Commission's authority, Rule 153 acquires the force of law and becomes an integral part of the Act* (citing cases) *to be judically noticed."*

By analogy, in the case at bar it is argued that the Traffic rules and regulations created by the Commissioners of the District of Columbia under the authority delegating such power to them by Congress acquire the force of law and become an integral part of the Act of Congress to be judicially noticed.

The case of Hurley vs. Crawley, 60 App. D. C. 245, 50 Fed. (2d) 1010, is authority for the statement that Courts take Judicial Notice of the Acts of Congress.

In the case of Old Dominion Stages, Inc. vs. Connor, 67 App. D. C. 158, 90 Fed. (2d) 403, the Court took Judicial Notice of the Virginia Traffic Laws pertaining to speed and reckless driving in an automobile collision case.

In Caha vs. United States, 14 S. Ct. 513, 516, 152 U. S. 211, Judicial Notice was taken of the rules and regulations of the Interior Department. The United States Supreme Court said:

> "Another matter is this: The rules and regulations prescribed by the Interior Department in respect to contests before the land office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. *But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice.* Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deductible from the cases, that wherever, by the express language of any Act of Congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice. * * *" (citing cases.)

As a result of this decision by the United States Court of Appeals for the District of Columbia we have this unique situation. The Federal Courts in the District of Columbia will take Judicial Notice of the Traffic laws of a State, (Virginia) Old Dominion Stages, Inc. vs. Connor, *supra,* and will take Judicial Notice of the Traffic laws on the roads in the Public Parks within the District of Columbia, Caha vs. United States, *supra,* (The Director of Public Parks is under the United States Department of Interior, Persham vs. United States, *supra*) but will not take Judicial Notice of the Traffic laws pertaining to the

streets and highways of the District of Columbia, although such laws are the peculiar laws of the Forum.

C. The United States Constitution, Art 1, Sec. 8, Par. 17, Authorizes Congress to Exercise Exclusive Legislation in all Cases Within the District of Columbia.

Congress is given exclusive jurisdiction over the District of Columbia for every purpose of government, national or local, in all cases whatsoever. The clause of the Constitution, Art 1, Sec. 8, Par. 17, confers upon Congress absolute authority and control over the District of Columbia.

Parsons vs. District of Columbia, 170 U. S. 45, 18 S. Ct. 521.

Capital Traction Co. vs. Hof, 174 U. S. 1, 19 S. Ct. 580.

D. The Commissioners of the District of Columbia Have no Power to Enact Municipal Ordinances.

The Commissioners of the District of Columbia have no power to enact Municipal Ordinances. Congress has reserved to itself the power of enacting Municipal Ordinances. The case of Patrick, *et al.* vs. Smith, 60 App. D. C. 6, 45 Fed. (2d) 924, said:

> "It must be remembered that the Congress of the United States exercises exclusive legislative powers within the District of Columbia, and the Public Utilities Commission is merely an administrative agency. In District of Columbia v. Bailey, 171 U. S. 161, 176, 18. S. Ct. 868, 874, 43 L. ed. 118, Mr. Justice White, speaking for the Supreme Court of the United States, said: 'The necessary operation of these provisions of the statutes is to cause the District commissioners to be merely administrative officers, with ministerial powers only. The sums of the municipal powers of the

District of Columbia are neither vested in nor exercised by the District Commissioners. They are, on the contrary, vested in the congress of the United States, acting *pro hac vice* as the legislative body of the District, and the commissioners of the District discharge the functions of administrative officials.'

In Coughlin v. District of Columbia, 25 App. D. C. 251, * * * The commissioners are not the municipality, but only the executive organs of it; and Congress has reserved to itself, not only the power of legislation in the strict sense of the term, which it cannot constitutionally delegate to anyone or to any body of men, but even the power of enacting *municipal ordinances*, such as are within the ordinary scope of the authority of incorporated municipalities. * * *''

In conclusion it is argued that the Traffic Laws of the District of Columbia are not Municipal Ordinances but are an Act of Congress to be Judicially Noticed by all Federal Courts and that the Court of Appeals erred in holding that they are not to be Judicially Noticed.

* * * * *

In the instant case the Trial Justice was also requested to instruct the Jury in Plaintiff's Requested Instruction No. 2, —''that the plaintiff in driving his automobile at this place had the right to assume that the north bound street car would be proceeding at a lawful rate of speed.'' This instruction is sound in law and is applicable to the operation of all street cars.

In Washington Railway & Electric Company vs. Clark, 46 App. D. C. 88, 98, objection was made to the granting of plaintiff's prayer No. 4, which read as follows:

> ''The jury are instructed as matter of law that plaintiff's intestate, when about to cross the defendant's tracks, in the absence of circumstances sufficient to indicate the contrary, had the right to assume that the defendant's approaching car was not exceeding, and would not exceed, the lawful speed.''

The U. S. Court of Appeals for the District of Columbia held that there was no error in the granting of this prayer for instruction to the plaintiff.

Other cases which enunciate this rule are:

Capital Traction Co. vs. Apple, 34 App. D. C. 559, 570.

Chunn vs. City & Suburban Railway Co., 28 S. Ct. 63, 207 U. S. 302.

City & Suburban Ry. Co. vs. Cooper, 32 App. D. C. 550.

Washington Ry. & Electric Co. vs. Upperman, 47 App. D. C. 219, 228.

Washington Ry. & Electric Co. vs. Stuart, 50 App. D. C. 74, 267 Fed. 632.

PART III.

A motorman in the operation of a street car is under a duty to exercise reasonable care and diligence. This requires a diligent lookout ahead, timely warning of the approach of the street car, and to have the car under ready control.

Plaintiff's Requested Instruction No. 3, which was refused, reads as follows:

"The Jury are instructed that it is the duty of persons in charge of streetcars operated on public streets to keep a diligent lookout ahead and to keep his streetcar under such control as a reasonably prudent person would do under the conditions then existing.

If, a motorman sees a vehicle a short distance in front of him, on the track or so near the track as to be in danger of being struck by the streetcar, it is his duty to use reasonable care and diligence to give the driver of such vehicle timely warning of the approach of the

streetcar, and to keep and to have such streetcar under such control that it may be stopped within a short distance, and to stop it, if necessary to avoid colliding with such vehicle.

The Jury are further instructed that every vehicle upon a highway within the District during the period from a half hour after sunset to a half hour before sunrise shall be equipped with lighted front and rear lamps" (R. 86).

The Trial Justice in instructing the Jury read to them Defendant's Requested Instruction Number 6, and then added the following:

> "I might also say that it was the duty of the defendant to maintain a lookout at all times as he operated the streetcar along the tracks" (R. 92).

Plaintiff's Requested Instruction No. 3, would have told the Jury that it was the duty of the street car operator to keep a *diligent lookout ahead* and to keep the street car *under such control* as a reasonably prudent person would do under conditions then existing. With respect to this part of the instruction the Court of Appeals' opinion says:— "Undoubtedly, this is true, and * * * the court * * * told them that it was the duty of the defendant to maintain a lookout at all times * * *" (R. 99). It is contended that the instruction given was not a substantial compliance with the law or prior decisions of the Court of Appeals.

In the case of Capital Traction Co. vs. Apple, 34 App. D. C. 559, on page 571, the Court stated: "Aside from the duty imposed by law not to exceed a certain rate of speed, it is the duty of the car operator to keep a *diligent lookout ahead* so that the car may be stopped in time, if possible, to avoid injury to one who may be crossing ahead of him." On page 574, in the Apple case, the Court said: "* * * It is the duty

of the operator to have his car under ready control so that it may be readily stopped when the danger is found to be imminent."

Washington Ry. & Electric Co. vs. Cullember, 39 App. D. C. 316, 324.

Louis vs. Washington Ry. & Electric Co., 51 App. D. C. 330, 279 Fed. 312.

* * * * *

The second paragraph of this instruction was held improper by the Court of Appeals because: "Such a doctrine * * * imposes on the Company the obligation of an insurer, * * *" (R. 100). The proposed instruction merely provides that when a motorman sees a vehicle a short distance in front of him, in close proximity to the tracks, IT IS HIS DUTY TO USE REASONABLE CARE AND DILIGENCE

1. to give the driver of such vehicle timely warning of the approach of the streetcar.
2. and to keep and to have such street car under such control that it may be stopped within a short distance, and to stop it, if necessary, to avoid colliding with such vehicle.

With reference to this language the opinion of the Court of Appeals, says:

> "All that is required of a motorman approaching or overtaking a vehicle on, or in such proximity to, the track as to suggest the danger of collision, is to give reasonable notice of the approach of the car, and so likewise to control its movements, as *in the exercise of reasonable care* would avoid running over or into it" (R. 100).

The proposed language was predicated, solely upon the duty of the motorman in the operation of a street car *to use reasonable care and diligence.*

In Capital Traction Co. vs. Crump, 35 App. C. 169, on page 177, the Jury was charged substantially as follows:

> "That it is the duty of persons in charge of a street-car to use reasonable care and diligence to observe whether vehicles a short distance in front of them are on or so near the track as to be in danger of being struck by the car, and that if they see such danger it is their duty to give timely warning of the approach of the car, and to keep the latter under such control that it may be stopped in time to prevent injury; and that the car driver is not relieved of this duty; even if the driver of the vehicle is negligent."

It is contended that the proposed instruction does not state a positive duty which imposes on the Capital Transit Company the obligation of an insurer, but imposes only the duty of a motorman to use reasonable care and diligence in the operation of a street car. The law is well settled in this jurisdiction that a motorman must avoid colliding with a vehicle when in the exercise of reasonable care he can do so. The proposed instruction asks for no more.

Conclusion.

It is respectfully submitted, in light of the foregoing, that the above petition for the issuance of a Writ of Certiorari to the Court of Appeals for the District of Columbia should be granted.

Respectfully submitted,

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